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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 915

BARBARA JUNE MUNCY AND CHARLES MUNCY,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION

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SUBJECT INDEX

	Page
Grounds for Review	1
The Accelerator Linkage	3
The Ignition Switch—Automatic Transmission Combination	4
Conclusion	7
Certificate of Service	8

Page

Blickman, Inc. v. Chilton, 114 S.W. 2d 646, n.w.h. 6

Brady v. Southern Ry., 320 U.S. 476 7

City of Austin v. Schmeder, 154 Tex. 416, 279 S.W. 2d 326 6

Eckenrode v. Pennsylvania Ry., 335 U.S. 329 7

Erie Ry. Co. v. Tompkins, 304 U.S. 64 2

Galloway v. United States, 319 U.S. 372 7

Gibson v. Phillips Pet. Co., 352 U.S. 874 reversing 232 F. 2d 13 2

Kimbriel Produce Co. v. Mayo, 180 S.W. 2d 504 6

Lavender v. Kurn, 327 U.S. 645 ..... 3,, 4, 7

Mercer v. Theriot, 377 U.S. 152, reversing 262 F. 2d 754 and 316 F. 2d 635 2

Moore v. C & O Railway Co., 340 U.S. 573 7

New York Central Ry. Co., v. Ambrose, 280 U.S. 486 2,3

Reeves v Tittle, 129 S.W. 2d 364, er. ref. 6

Rogers v. Missouri P.R. Co., 352 U.S. 500 7

Rosner v. Harrell Drilling Co., 261 S.W 2d 190, n.r.e. 6

Strakos v. Gehring, 360 S.W. 2d 787 6

Swafford v. Atlantic Coastline Ry. Co., 350 U.S. 807 reversing 220 F. 2d 901 2

Texas Bitulithic Co. v. Caterpillar Tractor Co., 357 S.W. 2d 406 6

Wilkerson v. McCarthey, 336 U.S. 53 1,3,7

Williams v. Carolina Ins. Co., 348 U.S. 802, reversing 210 F. 2d 477 2,3

Rules

43(b) F.R.C.P. 2

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To The Honorable Supreme Court of The United States:

The policy of this Court in matters here presented was succinctly and ably stated in the concurring opinion in *Wilkerson v. McCarthey*, 336 U.S. 53, 70, by Mr. Justice Douglas joined by Mr. Justice Murphy and Mr. Justice Rutledge as follows:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below

> but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

We find no change in this criterion. It prevents erosion of the Constitutional right of trial by jury by State and lower Federal Courts. Certiorari is further required herein to assure respect for the decisions of this Court and the right of cross-examination and impeachment of adverse parties and witnesses. Consequently, Respondent's argument that "No Grounds for Review Are Shown by Petitioners" is wholly without merit.[1] (Respondent's Brief pp. 3-4).

Only two opinions of this Court are cited by the Circuit Court as support for its action. *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (Pet. A3), however, is misapplied to hold binding on a trial on the merits principles that were founded on evidence in a State interlocutory venue proceeding, and which evidence is not shown to be and, in fact, is not substantially the same as that adduced on the merits in the Federal trial court. The case of *New York Central Ry. Co. v. Ambrose* (1930), 280 U.S. 486, 74 L. Ed. 562 (Pet. A6),

[1] This Court granted certiorari and summarily reversed the Fifth Circuit for rendering judgment contrary to the jury verdict on the same ground as here—that the verdict was based on "guess and speculation"—in the diversity case of *Williams v. Carolina Life Insurance Co.*, 348 U.S. 802, 99 L. Ed. 633, reversing 210 F. 2d 477. For much less reason than exists in the case at bar, this Court likewise summarily reversed the Fifth Circuit for rendering judgment contrary to the jury verdict in the diversity personal injury cases of *Swafford v. Atlantic Coastline Railroad Co.*, 350 U.S. 807, 100 L. Ed. 725, reversing 220 F. 2d 901; and *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874, 1 L. Ed. 77, reversing 232 F. 2d 13; and by written opinion reversed the Fifth Circuit for the same reason in the recent diversity personal injury case of *Mercer v. Theriot*, 377 U.S. 152, 12 L. Ed. 2d 206, reversing 262 F. 2d 754, and 316 F. 2d 635. And see cases discussed Petitioners' Application for Certiorari pp. 9-18; and Rule 43(b) F.R.C.P.

which has been expressly repudiated, was cited to resurrect the ignoble twins of "speculation and conjecture", which have been laid to rest in their well deserved and dishonorable graves.[2]

The Accelerator Linkage.

If there were nothing more, Respondent's admitted "four shreds" of evidence concerning the accelerator linkage (Respondent's Brief pp. 7-8), is sufficient under the controlling Federal test of sufficiency of evidence set forth by this Court

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[2] In *Wilkerson v. McCarthey* (1949), 336 U.S. 53, a F.E.L.A. case, this Court recognized the right of jury trial to be the same as in other negligence cases, and held: "In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence." (Id., 63). In the concurring opinion Mr. Justice Douglas, joined by Mr. Justice Murphy and Mr. Justice Rutledge, cited *New York Central Ry. Co. v. Ambrose,* supra, as illustrative of the error the Supreme Court had formerly committed in leading "* * * the way in overturning jury verdicts rendered for employees." (I.d. 69). It was then stated: "The basis of liability under the Act is and remains negligence. Judges are not always agreed as to what facts are necessary to establish negligence. We are not in agreement in all cases * * * The historic role of the jury in performing that function * * * is being restored in this important class of cases." (I.d. 69, 71).

In *Lavender v. Kurn,* 327 U. S. 645, this Court expressly disposed of "speculation and conjecture" thusly: "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Id. 653).

See also the later cases cited in Footnote 1, supra, and those cited and discussed pages 9-13 of the Petition.

in *Lavender v. Kurn*, supra, and since followed. Much less was required by this Court to reverse the recent four diversity cases from the Fifth Circuit cited in Footnote 1., supra.

Lest it be overlooked, we again respectfully call the Court's attention to the fact that there is positive evidence that item 2 of the admitted "four shreds" was a sticking accelerator mechanism (R. Vol. II. 624-625, 627) and not a fast idling carburetor.

Further, and most convincing of improper design was Respondent's tremendous, but unsuccessful, effort to convince the jury and trial court that an accelerator linkage with non-friction nylon sleeves had replaced the linkage with ten binding points, which it previously admitted was the one in use — item 4, of the "four shreds". (R. Vol. II. 692-694; Plaintiffs' Exhibit 6, R. Vol. I. 116; Defendant's Exhibit 9 and 10, R. Vol. II. 948-949, 1004-1005, 943-946).

The Ignition Switch—
Automatic Transmission Combination.

The record reveals that much evidence was obtained after the opinion by the Dallas Court of Civil Appeals of May 11, 1962 (357 S.W. 2d 430). This additional evidence was obtained by depositions and interrogatories under the Federal Rules of Procedure and by testimony of witnesses that never appeared in the State venue hearing. It was taken and presented to fill the gap, if any there was, indicated by the interlocutory venue opinion. This accounts for the absence, no doubt, of any attempt by Respondent to bring forward the

record in the State venue proceeding to substantiate any claim that the evidence there was substantially the same as here.

The evidence here reveals: (1) Respondent's recognition of a danger in combining the switch, designed as it was, with an automatic transmission; (2) Respondent's knowledge of its cars, so designed, being inadvertently left unattended with the motor running; (3) that Respondent prevented removal of the key from the accessory position as a reminder to turn off the radio and thereby guard against nothing more dangerous than leaving the car unattended with the radio on; and (4) that the tragedy would not have happened but for this combined design, because Respondent's co-defendant thought she had turned the motor off since she had the key in her hand. (Pet. 4, 7-9; R. Vol.II pp. 720-722, 735-736, 796-797, 965-966, 648-649, 641-643, 630).

Thus, the evidence showing, or at least giving rise to a reasonable inference, that the tragedy would not have occurred but for the combined design of the questioned switch and the automatic transmission, and that there was a realizable likelihood that third persons might act as did Respondent's co-defendants, the jury was warranted in finding Respondent liable.

This is the law announced in the Restatement of Torts and the established law of Texas, Respondent's specious arguments to the contrary notwithstanding (Respondent's Brief

pp. 4-7). *Strakos v. Gehring*, (Tex. Sup. Ct. 1962) 360 S.W. 2d 787, supra; *Texas Bitulithic Co. v. Caterpillar Tractor Co.*, 357 S.W. 2d 406 (writ ref., n.r.e.), the latest expression on the subject by the Dallas Court of Civil Appeals; *Blickman, Inc. v. Chilton* 114 S.W. 2d 646; *Reeves v. Tittle*, 129 S.W. 2d 364, 367, er. ref.; *Kimbriel Produce Co. v. Mayo*, 180 S.W. 2d 504, 507, er. ref. w. m.; and *City of Austin v. Schmedes*, 154 Tex. 416, 279 S.W. 2d 326, 331. The authorities from other States and Federal Circuits cited by the Circuit Court and Respondent do not involve the substantive law of Texas and are of no consequence even if they support the propositions for which they are cited, which they do not. Since authorities from other jurisdictions are of no controlling effect, we purposely refrain from citing or discussing the many that support the judgment of the trial court.

Article 6701d, Sec. 97, Texas Revised Civil Statutes, and *Rosner v. Harrell Drlg. Co.*, 261 S.W. 2d 190, do not insulate Respondent against liability for its own negligence, as Respondent would lead the Court to believe (Respondent's Brief, pp. 5 and 7). On the contrary, said authorities support the jury verdict by illustrating the magnitude of the danger resulting from the combination of the questioned switch with an automatic transmission.

None of the cases cited by the Fifth Circuit or respondent indicate, even in half measure, that the evidence did not raise an issue for the jury under the substantive law of Texas.

And none of the cases cited authorize a substitution by the Fifth Circuit of its findings for those of the jury.[3]

Moore v. Chesapeake & Ohio Ry., 340 U.S. 573 (1951), the only other Supreme Court decision cited by Respondent to support the rendition of judgment contrary to the jury verdict, does not give it the comfort it desires. It was there claimed that Petitioner's deceased was thrown from the train by a sudden stop which was negligence. The engineer, the only witness called by Petitioner, testified that only one stop was made and that was after he saw the deceased fall, and the stop was made to avoid injuring him. This too was a five to four decision, has never been cited by this Court except in dissenting opinions and in *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 510, 1 L. Ed. 2d 493, 502, to show that it, the *Moore* case, the *Eckenrode* case and the *Brady* case, supra, were the only F.E.L.A. cases since 1939 in which the Supreme Court of the United States affirmed on the ground that no question for the jury was presented.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Certiorari, the writ should be granted; and it is respectfully submitted that this is a proper case for an order

[3] To bolster the rendition of judgment contrary to the jury verdict and judgment of the trial court, Respondent cites *Brady v. Southern Ry.*, 320 U.S. 476 (1943), *Eckenrode v. Pennsylvania Ry.*, 335 U. S. 329 (1948), and *Galloway v. United States*, 319 U. S. 372, (1943). Each of these cases are five to four decisions and are prior in time to *Wilkinson v. McCarthey*, supra, which cites and follows *Lavender v. Kurn*, supra. These later cases expressly repudiate the principle for which these earlier cases are cited.

summarily vacating the judgment of the Circuit Court of Appeals and reinstating the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Franklin Jones, one of the attorneys for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served a copy of the foregoing Reply To Respondent's Opposition on Mr. Leon Jaworski and Sam H. Hood, counsel for Respondent, and Mr. Thomas W. Watkins, of counsel, by mailing the same, first class, postage prepaid, addressed to their office at the Bank of the Southwest Building, Houston, Texas 77002, and 3044 West Grand Boulevard, Detroit, Michigan 48202, respectively dated this the .... day of February, 1967.

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